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Locke Lord QuickStudy: What the Regulated Community Needs ?to Know About EPA's Proposed ?Designation of PFOA and PFOS ?as CERCLA Hazardous Substances

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On August 26, 2022, the US Environmental Protection Agency (EPA) released a pre-publication version of a highly-anticipated proposal to add two of the most widely-used per- and polyfluoroalkyl substances (PFAS) to the list of hazardous substances under Section 102(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The substances proposed for listing are perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS). The substances have been used heavily in manufacturing, and are present in many common products such as cookware and packaging. Commentators describe the substances as being ubiquitous. As a frame of reference, the Texas Water Conservation Association has advised that PFAS are believed "to be in the bloodstream of 95% of all Americans." EPA states that PFAS "persist" in the environment and for this reason are bioaccumulative in humans and animals. Thus, they are less prone to naturally attenuate, as is the case with many regulated substances. At this time, treatment technologies are emerging. EPA's website identifies three more traditional approaches to treatment, including "pump and treat" through activated carbon or ion exchange treatment, and, as a more likely end-of-pipe solution, high pressure membranes. While these more traditional treatment methods are available, in-situ treatment technologies are still being developed. But it is clear that technology to address PFAS contamination remains in the early innings.

In the proposed rule, EPA asserts that listing PFOA and PFOS as hazardous substances will "expedite" remediation of contaminated sites, while also reducing human and ecological exposure to these chemicals. Because these substances are ubiquitous, if and when finalized, the proposed rule could breathe new life into the Superfund program, unleash a deluge of government enforcement and cleanup actions, citizen suits brought by nongovernmental organizations, and private party cost recovery claims. Further, parties could potentially become subjected to unforeseen contractual indemnity claims, depending upon drafting techniques in merger, acquisition, or similar documents. The proposed rulemaking also could potentially reopen sites that parties have understood to have been closed for many years. The CERCLA designation also would augment EPA's reporting and information gathering authorities as the agency continues to build its database of PFAS contamination.

The Proposed Designation Could Unleash a Flood of CERCLA Enforcement and Cost Recovery Litigation

Designating PFOA and PFOS as CERCLA hazardous substances would authorize EPA and likely state agencies to initiate cleanup or implement enforcement actions to compel response actions related to PFOA and PFOS contamination and recover PFOA and PFOS cleanup costs from potentially responsible parties (PRPs). The designation would also enable potential private parties to seek contribution or cost recovery from other PRPs. It is likely that impacts will be felt by myriad industries and parties for several reasons. First, EPA recently dramatically lowered its health advisory levels (HALs) for PFAS, which we previously covered here. While the HALs are not cleanup objectives, it is clear that as a result of the advisories risk-based PFOA and PFOS response actions will be conducted to stringent concentration levels. EPA has stated its intention to leverage other legal authorities to restrict PFAS chemicals from being released into the environment (as discussed in EPA's Strategic Roadmap to address PFAS contamination nationwide). The rising number of state regulatory and legal actions regarding PFAS will almost certainly result in EPA focusing on sites with PFOA and PFOS releases for CERCLA response actions and enforcement. Even if EPA handles PFAS enforcement matters with a light touch, the designation swings the door wide open for private party litigation under CERCLA and likely under state superfund statutes as and when these substances are incorporated into listings. The consequences may be widespread and far-reaching for a host of industries based on their legacy operations. According to EPA, industries most likely to be potentially affected by this rule include:

Aviation operations	Firefighting foam manufacturers	Photographic film manufacturers
Carpet manufacturers	Landfills	Polish, wax, and cleaning product manufacturers
Car washes	Lithography printers	Polymer manufacturers
Chemical manufacturing	Medical devices	Textile mills
Chrome electroplating, anodizing, and etching	Paper mills	Waste management and remediation services
Coatings, paints, and varnish manufacturers	Pesticides and insecticides	Wastewater treatment plants
Federal agencies that used firefighting foams	Petroleum and coal product manufacturers	
Fire departments and training centers	Refiners and terminals	

It would be reasonable and appropriate for these industries to begin to understand potential legacy liabilities related to operations, and also to begin to undertake prophylactic liability mitigation measures at facilities under their control.

Other Immediate Effects of a Final Designation.

Besides greatly expanding the scope of CERCLA liability, opening the door to new lawsuits, and potentially increasing cleanup costs at sites contaminated by PFAS, the designation, if and when finalized, will have several other immediate effects on both the regulated community and the federal government.

First, the designation will trigger reporting requirements. Under CERCLA and the Emergency Planning and

Community Right-to-Know Act (EPCRA), any person in charge of a vessel or facility must immediately report releases at or above the reportable quantity (RQ) of the substances to the federal, state, tribal, and local authorities as soon as they have knowledge of any such release. EPA's proposed RQ for these designations is modest—only 1 pound or more over a 24-hour period.

Second, a final designation will require federal agencies to meet the property transfer requirements in CERCLA Section 120(h) when selling or transferring federally-owned real property, including: (i) providing notice when any hazardous substance "was stored for one year or more, known to have been released, or disposed of" on the property; and (ii) providing representation/notice that remedial actions for any PFAS remaining on the property have been performed before the transfer and that any additional remedial action deemed necessary post-transfer will be conducted by the federal government.

Third, a designation will require the Department of Transportation (DOT) to list and regulate PFOA and PFOS as hazardous materials under the Hazardous Materials Transportation Act. As a result, industries involved in the transportation of PFAS-containing materials and products will need to comply with DOT response training, packaging, labelling, and reporting requirements.

How Might this Proposed Rule Impact Transactions, Site Assessments and Existing Contaminated Sites?

Besides new reporting and recordkeeping requirements, a notable change will be the need for heightened diligence in real estate and corporate transactions. First, negotiations of indemnities as well as representations and warranties will take on heightened importance. As stated before, these substances were widely used and until recently were not a material focus of site risk allocation. The coverage of indemnities regarding preexisting conditions as well as drafting nuances as to covered substances will be important, as will language contained in disclosure schedules. Moreover, until more is known about acceptable PFAS drinking water concentrations and cleanup objectives, as well as the cost and time to conduct response, it is unlikely that insurance products will be readily available to bridge transactional risk allocation gaps.

Second, given the likely prevalence of these substances and the current uncertainty involving the cost and time associated with cleanup, there may be an even greater emphasis on diligence, including the need for soil and groundwater analyses, and greater scrutiny of risk allocation provisions in transactional documents. Further, because of the stringent HALs (and likely stringent cleanup objectives), parties should expect cleanups to be costly and time consuming. The proposed rule also may prompt EPA to resume its suspended rulemaking concerning the Standards and Practices for All Appropriate Inquiries regulation. And, as noted above, federal property transactions involving PFAS impacts will be subject to additional scrutiny.

Third, ongoing contaminated site work under CERCLA, the Resource Conservation and Recovery Act (RCRA), and state cleanup programs will likely also be impacted. In addition to the potential for reopening formerly closed sites, scoping activities at sites will broaden, become more time consuming, and likely more expensive. The specter of reopeners will be an ongoing issue.

EPA Has Proposed to Interpret Section 102(a) of CERCLA as Barring Consideration of Costs

EPA proposes to interpret Section 102(a) as *precluding* it from considering costs when designating hazardous

substances. While EPA acknowledges that the designation will have both direct and indirect economic effects, the proposal only discusses relatively minimal increases in *reporting* costs. EPA claims that the larger, direct costs of additional cleanup are not being "created" by the designation but merely "shifted" from taxpayers to PRPs.

EPA downplays the financial impact upon CERCLA responsible parties that played no role in the manufacture, use, or release of PFAS into the environment. Instead, EPA claims that it is "focused on holding responsible those who have manufactured and released significant amounts of PFOA and PFOS into the environment" and "will use enforcement discretion and other approaches to ensure fairness for minor parties who may have been inadvertently impacted by the contamination." While these concerns echo those raised after CERCLA was passed into law in 1980, the prevalence of PFOA and PFOS and the likely stringent cleanup standards, may raise novel compliance issues and create unprecedented costs. The regulated industry thus should expect to be involved in more cleanups of legacy sites, which may have a long life span.

Future Actions

In the proposed rule, EPA also announced it will develop an Advance Notice of Proposed Rulemaking seeking comments on whether other PFAS compounds warrant CERCLA designation PFOA and PFOS have been among the most widely-used, but thousands of other PFAS have been manufactured and distributed in commerce.

Next Steps

The proposed rule is expected to be published in the Federal Register in the next several weeks. Following publication in the Federal Register, EPA will accept comments on the proposed rule for a 60-day window (Docket: EPA-HQ-OLEM-2019-0341 on www.regulations.gov).

If you have any questions about the proposed rule, or seek assistance in drafting a comment for the proposed rule, please reach out to a member of Locke Lord's environmental group.

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